

No. 15683

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**United States Court of Appeals**  
**For the Ninth Circuit**

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W. S. PEKOVICH and ADMIRALTY ALASKA GOLD MINING  
COMPANY, a Corporation, *Appellants*,

vs.

MINNIE COUGHLIN, as Executrix of the Estate of ROBERT  
E. COUGHLIN, deceased, *Appellee*.

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APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF  
ALASKA, DIVISION NUMBER ONE

---

**APPELLANTS' BRIEF**

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THE ARGUS PRESS, SEATTLE

**FILED**

DEC 27 1957



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### APPELLANTS' BRIEF

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#### JURISDICTION

This action was brought in the District Court for the District of Alaska, Division No. One, at Juneau, by Minnie Coughlin, the widow of Robert E. Coughlin, deceased, as executrix of his estate, pursuant to authority of the U. S. Commissioner and ex-officio Probate Judge at Juneau (23).<sup>1</sup>

The jurisdiction of this Court is invoked under the provisions of Title 28, U.S.C.A., Sec. 1291.

#### STATEMENT OF THE PLEADINGS

##### 1. The Complaint

The complaint alleges that on February 5, 1954, defendant W. S. Pekovich, individually and as president

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<sup>1</sup> Figures in parenthesis refer to pages of the Transcript of Record, unless otherwise indicated.

of Admiralty Alaska Gold Mining Co., entered into an agreement with Robert E. Coughlin, now deceased, whereby 4,000 shares of the company's stock was to be issued to Coughlin for taking care of bookkeeping and other things in connection with the Defense Mineral Exploration Administration, generally referred to as D.M.E.A.

It is further alleged that Robert E. Coughlin performed the services, but that defendants have failed and refused to deliver the 4,000 shares of stock as agreed, and the complaint prays for judgment against defendants ordering them to deliver to the plaintiff 4,000 shares of the stock of the company, or in lieu thereof the fair market value of said stock, together with plaintiff's costs and disbursements (3-4).

The complaint refers to and is based on an agreement which is attached thereto as Exhibit A and reads as follows:

“Feb. 5-54

“ADMIRALTY ALASKA GOLD MINING Co.

“Main Office:

Box 529, Juneau, Alaska

“Mine Office:

Funter Bay, Alaska

“Mr. R. E. Coughlin

Juneau, Alaska

“Dear Bob:

“This will confirm my understanding with you that if you take care of the bookkeeping and other necessary things in the connection with the D.M.E.A. Admiralty Alaska matter I will give you *in compensation therefor* or cause to be given you



4,000 four thousand shares of the Admiralty Alaska Gold Mining Co. stock.

“IN WITNESS whereof, my hand.

/s/ W. S. PECKOVICH”

(Plaintiff’s Exhibit No. 2, page 27)

Since the fundamental question involved in this case is whether the 4,000 shares of stock were to be given to Coughlin as a bonus or as compensation for his services as a part-time bookkeeper, we have italicized the words “in compensation therefor,” the significance of which will appear as the discussion herein proceeds.

## **2. The Answer**

The Answer of defendants admits that Coughlin performed the services for which he was employed and that the agreement relied upon by plaintiff was made, and alleges that thereafter Coughlin elected to be paid in money instead of stock ; that he was so paid in full for his services and hence that he is not entitled to and never claimed the 4,000 shares of stock or any part thereof for his services.

The Answer further alleges by way of affirmative defense that the mining company had at all times an office in Juneau, and one part-time employee to take care of the bookkeeping and other necessary things in connection with its Defense Minerals Exploration Administration matter for which services it paid \$75.00 per month ; that at the annual meeting of the Company on February 5, 1954, the part-time employee resigned and that Coughlin was thereupon employed to take over and perform the services as part-time bookkeeper at the

same rate of pay; that at that time the mining company was entirely without funds to pay for the services in money and that it was therefore agreed that the defendant Pekovich would give or cause to be given to Coughlin 4,000 shares of the Company's stock to compensate him for his services from said date on February 5, 1954, to the next annual meeting of the stockholders on February 5, 1955; that in May, 1954, the Company acquired sufficient funds to pay Coughlin for his services in money instead of stock and that Coughlin thereupon elected to receive payment in money instead of stock for his services, and that he was fully paid therefor not only during the Company's fiscal year but until his death in September, 1955 (5-10).

The affirmative defense further sets forth that at no time during the fiscal year mentioned and until his death on September 22, 1955, did Coughlin ever request, demand or claim 4,000 shares of the stock or any part thereof for the services referred to in plaintiff's Exhibit A, or for any other services, for the reason that said agreement of February 5, 1954, had been superseded and nullified by his election to receive his compensation in money instead of stock of the Company.

The case was tried before the District Court of the District of Alaska on the basis of these allegations, which held, in effect, that the plaintiff Coughlin was to receive the 4,000 shares of stock in addition to the \$75.00 per month he was paid for his services, and therefore entered judgment for plaintiff (10-15).

## STATEMENT OF THE CASE

This case presents a peculiar situation.<sup>2</sup> The record shows that ~~plaintiff below~~ *Coughlin* was a stockholder and vice-president of the Admiralty Alaska Gold Mining Co., and apparently had been active in its affairs for some time (33).

The Company had the usual ups and downs of mining companies and at the time Coughlin undertook to do its bookkeeping on a part-time basis was in a strained financial condition. Since there was no money immediately available to pay the \$75.00 a month which had been paid to the previous bookkeeper on a part-time basis, the question was how this should be carried on. Coughlin was in a position to undertake this work in addition to his other activities and indicated a willingness to do it, but the question was how he should be compensated therefor. Defendant Pekovich, who was general manager of the mining company, proposed to give Coughlin 4,000 shares of the Company's stock for doing the work until the next annual meeting. This was quite logical because at that time the stock of the Company could be sold at prices which made the 4,000 shares worth practically the equivalent of \$75.00 per month for one year (34, 51).

Thereafter Pekovich went to New York and succeeded in raising about \$25,000.00, which became available to the Company in May, 1954. This money evidently looked better to Coughlin than the shares of stock and he therefore decided that he would prefer the cash (35).

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<sup>2</sup>The question involved is entirely one of fact and the conclusions to be drawn therefrom, and therefore no court decisions are referred to herein.

If it is not clear from the record whether Coughlin just paid himself out of the funds of the Company or discussed it with Pekovich and got the latter's approval, but the fact is that in May, 1954, he received or was paid \$225.00 as his salary for February, March and April, and that thereafter he continued to receive \$75.00 a month, not only for the balance of the fiscal year, but continued until he died in September, 1955 (Dfts. Exhibit A, page 76).

The record also shows that Coughlin's predecessor, who was a certified public accountant, received the same compensation and that he did the work from his own office, whereas Coughlin as a bookkeeper was provided with an office and other facilities and yet received the same compensation (37, 47). It also appears that Coughlin's successor undertook the work for \$75.00 a month and that this was regarded as adequate compensation for a part-time job which could be performed at the convenience of the holder thereof (42). Under the circumstances, it is difficult to see how the court could reach the conclusion that it did. At one point in the proceeding, the court seemed convinced that there was nothing to the claim. At pages 45-6 of the Transcript, the court said:

“Well, so far, here is what we have. Now, let's look at it coldly. We have a company that had ordinarily paid the secretary-treasurer for this work and other work the sum of seventy-five dollars per month, according to the testimony. The company was broke when they made this deal with Mr. Coughlin, who had formerly been a vice-president and was very familiar with the situation of the company, so Mr. Pekovich, the defendant herein,



wrote this letter. Thereafter, Coughlin, the deceased, drew seventy-five dollars per month. Now, certainly, he can't get both the stock and the money."

Of course, this statement was made before all of the evidence was in, but we respectfully submit that nothing was adduced on this record which would justify a different conclusion than that indicated by the first impression of the District Judge.

### **ASSIGNMENTS OF ERROR**

It is our contention that the court erred and that judgment should be reversed upon the following grounds:

1. That the agreement referred to in the complaint and attached thereto as Exhibit A shows conclusively that the 4,000 shares of stock were to be issued to Coughlin as full compensation for his services, and that the court erred in holding to the contrary.

2. That when plaintiff in his capacity as the book-keeper (Secretary-Treasurer) received or paid himself \$75.00 per month for his services, he thereby elected to take cash instead of stock and the court erred in holding that he was entitled to both.

3. That the findings of fact, conclusions of law and decree are not supported by the evidence.

### **ARGUMENT FOR APPELLANTS**

#### **The Complaint Should Have Been Summarily Dismissed**

In view of the written agreement and the foregoing undisputed facts, we might well rest the case on what has already been said.

The Pekovich letter of February 5, 1954 (Plaintiff's Exhibit No. 2, page 27) specifically states that the 4,000 shares of stock were to be given to Coughlin *in compensation for* his services. If this stock had been intended to be in addition to a salary, Pekovich would undoubtedly have so stated in his letter.

In view of the unqualified statement in the letter that the 4,000 shares of stock were to be in compensation for the services, it should only be necessary to consider the fact that Coughlin took the \$75.00 a month for his services, and that he is therefore not entitled to the stock. This was the opinion of the court after it had heard the evidence in chief of plaintiff and a substantial part of the testimony of defendant Pekovich, as shown by the statement above quoted.

Notwithstanding these considerations, the court admitted evidence designed to show that the 4,000 shares of stock were to be given to Coughlin in addition to the stipulated salary of \$75.00 per month. This testimony is extremely vague and in large part hearsay, but since it was entertained by the court, we shall briefly refer to it here and then consider the evidence upon this point offered on behalf of defendants.

### **The Evidence Does Not Sustain Plaintiff's Contentions**

To begin with, plaintiff Minnie Coughlin merely identified the letter of February 5, 1954, to her deceased husband from Pekovich, stated that her husband had performed the services and that he had not received the 4,000 shares of stock (24-29).

Later she testified that on November 4, 1954, her hus-

band wrote a letter to the Securities Exchange Commission to which she received a reply dated December 3, 1954 (Plaintiff's Exhibit No. 4, 134-5) from which it appears that Coughlin had stated in his letter that prior to 1952 he owned no stock in the Company but since that time acquired a "beneficial interest" in 5,000 shares. This would seem to indicate that by that time Coughlin had conceived the idea that he might claim both the stock and the salary he was receiving, but as will appear later he never even intimated to defendant Pekovich that he had any such idea.

Another witness for plaintiff was C. J. Ehrendreich who had preceded Coughlin as bookkeeper for the Company at \$75.00 a month. He was a certified public accountant and was also secretary-treasurer of the Admiralty Alaska Gold Mining Company (113).

After some discussion as to whether he could testify as to conversations he had with Coughlin, and the court taking the view that this was in order under an Alaska statute, he testified that around the end of January, 1955, they discussed pretty generally the work and Coughlin said: "I can see now why you kept saying that \$75.00 wasn't enough" and I said, "Well, Bob, my understanding is that you settled for the same thing." He said, "Well, I have got some stock." He didn't mention the amount but he said, "Well, I have got some stock" (121).

From this it appears that Coughlin never told Ehrendreich that he was to receive 4,000 shares of stock in addition to the 1000 shares already had.

This certainly does not prove that Coughlin was to re-

ceive the 4,000 shares in addition to his \$75.00 a month, but even if Coughlin had said so or thought so, it would not establish the fact. He never took that position with the defendants and they did not know that he thought he was entitled to both. Pekovich had written him that he was to receive 4,000 shares in compensation for his services since cash was not available, and naturally assumed that when Coughlin paid himself the \$75.00 as soon as money became available that he was taking the money in lieu of the stock.

Incidentally, it appears from the cross-examination of witness Ehrendreich that when he was secretary-treasurer of the Company, he furnished the clerical and the office space in addition to his services, all for \$75.00 a month (124). He was a certified public accountant whereas Coughlin was merely a bookkeeper who did the work in the office of the Company and was provided with clerical help.

Defendant's Exhibit C was produced at the request of counsel for plaintiff and contains the Minutes of the Annual Meeting of the Stockholders held February 7, 1955. Among the stockholders listed as present and the number of shares each had, there appears the name of Robert E. Coughlin with 5,000 shares. Coughlin was then secretary of the Company and he prepared the Minutes. The listing of 5,000 shares as belonging to him therefore is merely in the nature of a self-serving declaration. In any event, this does not prove that he was entitled to the 4,000 shares in addition to his monthly salary.

The 4,000 shares were to be compensation for the



services from February, 1954, to February, 1955, but Coughlin took cash instead and continued right on after that fiscal year with no bonus. But no matter what Coughlin may have thought, he waived any claim to the 4,000 shares when he took cash in lieu thereof, and anything he may have done in his capacity as a bookkeeper or otherwise to make it appear that he was to receive both, or that the stock was intended as a bonus, is of no effect and does not bind the defendants.

Another of plaintiff's witnesses was Mrs. Turnmire, her married daughter. She testified that she came to Juneau on July 1, 1955, and lived with Mr. and Mrs. Coughlin. She testified that she heard them discuss this matter at one time and was asked what was said at that time, to which she replied that one day in the summer of 1955, Mr. Coughlin was going to the office and as near as the witness could remember, her mother said: "Pop, you better get those shares from Sam" and Bob said "Oh, he will give them to me." The witness said she could not remember anything else specifically but she did remember that (126-7).

Of such is the evidence on which plaintiff relies to overcome the specific statement in the letter of February 5, 1954, that the 4,000 shares of stock were to be in compensation for the services.

As against this vague and uncertain evidence of plaintiff, we have the written confirmation of Pekovich addressed to Coughlin which specifically states that if the latter would take care of the bookkeeping and other necessary things "I will give you in compensation therefor or cause to be given you 4,000 shares of the Admir-

alty Alaska Gold Mining Company stock," and the undisputed and admitted fact that Coughlin received \$75.00 a month, not only for the period for which he was otherwise to receive the stock, namely, for the year ending February 1, 1955, but also for each month thereafter until he passed away in September of that year.

The numbers of the checks, the dates, the purpose and the amount of each payment are set forth in defendant's Exhibit A, which appears on pages 76 and 77 of the Transcript of the Record.

Coughlin began his work for the Company at the time of the annual meeting on February 1, 1954, when there was no money in the treasury of the Company to pay him in cash for his services. When funds became available later in May, 1954, Coughlin evidently felt that he would prefer to be paid in cash for his services than to rely upon the uncertain and fluctuating value of the corporation's stock; so on May 28, 1954, as the secretary-treasurer of the Company, he issued himself a check for \$225.00 to cover his salary for February, March and April and followed this course not only to the end of the year for which he was originally employed, but until he died in September, 1955, as shown by the exhibit referred to (76).

When Pekovich was examined with reference to the agreement with Coughlin, he testified as follows (pages 34-35 of the transcript):

"Q. Now, at the time you wrote that letter to Mr. Coughlin you used the language 'if you take care of the bookkeeping and other things in the connection with the D.M.E.A.' Did you mean that he'd take over the work of secretary-treasurer?

A. Yes, I did.

Q. Your letter further reads, 'I will give you in compensation therefor or cause to be given you four thousand shares of the stock.' What did you mean by that?

A. Well, 'cause' to give him, I thought if the board of directors don't agree with my agreement that I would pay it myself, personally; that is why 'I give you or cause to be given to you.'

Q. But it wasn't actually the company—it was on behalf of the company that you wrote the letter?

A. Oh, yes.

Q. And why was it that you specified four thousand shares of stock?

A. Because at that time the company was practically to zero financially, and we had been struggling for a long time before to meet matching government loans and all, and I think we didn't have at that time in the bank only a few hundred dollars; Bob knows as well as I did, and probably better, because he was vice-president of the company; and I could not ask him to do the work for nothing, so I gave him the stock, which at that time was worth around eight hundred dollars.

Q. Mr. Pekovich, when you wrote the letter, did you intend that that be the salary for the work of secretary-treasurer?

A. I did.

Q. Now, subsequently to that date did anything transpire as far as the secretary-treasurer's salary was concerned?

A. Soon after that time, I think the beginning of March, I went to New York. I raised about twenty-five thousand dollars of my own, which I put at

the disposal of the company and at the disposal of Bob, and from that time on he drew the salary right along.

Q. And then you say he drew a salary?

A. Yes. He drew a salary of seventy-five dollars a month.

Q. Now, prior to the time he drew the salary and when you entered into this agreement or wrote the letter was the four thousand shares of stock for the salary?

A. It was originally intended to.”

After an interruption, Pekovich continued as follows (page 36 of transcript of record):

“Q. (By MR. McLEAN): Mr. Pekovich, you said that Mr. Coughlin drew a salary of seventy-five dollars a month while—after you had obtained some monies from New York?

A. The first two or three months he didn’t draw the salary because he didn’t have the money. Then he accumulated, drew accumulated, I think, two hundred and twenty-five dollars at one time, but it was covering from the time he took over.

Q. Did you consent to the withdrawal of that as a salary?

A. Oh, yes. I consented to that; and, as a matter of fact, if I had the money at that time, I wouldn’t have asked him otherwise.

Q. And what was your understanding on the withdrawal of that salary in the form of cash?

A. That was a full compensation when he was drawing seventy-five dollars. That is the same salary as we paid before.”



On page 38 of the transcript, the following testimony appears:

“Q. (By MR. McLEAN): What conversation did you have with Mr. Coughlin with respect to withdrawing the salary, Mr. Pekovich.

A. Well, as a matter of fact, I don't know that we had any conversation, but we did have a conversation about assuming stock for the payment to following annual meeting.

Q. And what was the conversation, as best you can remember, as to Mr. Coughlin's claim on the stock after he had been drawing the salary.

A. He never did claim the stock.

Q. You say he—

A. No; he didn't.

Q. Can you recall what, in effect, Mr. Coughlin told you with respect to his claim on the stock?

A. He never told me anything. That wasn't brought up at all, one way or the other. After he started drawing salary he finished that year that way. Then he started another year and was up to September on the same salary without any stock, without any other compensation except the seventy-five dollars a month.”

On page 55 of the transcript, Pekovich testified that Coughlin never made a demand upon him for the 4,000 shares of stock or say anything to him about it.

We think it is clear from the foregoing testimony of Pekovich that Coughlin was to receive the 4,000 shares of stock as compensation for his services and nothing else, and that the latter chose to pay himself therefor in cash when money became available to the company.

On cross-examination of Pekovich, counsel for plaintiff presented him with a letter in his own handwriting addressed to Mr. Roden, who was then president of the company. This was received in evidence as plaintiff's Exhibit No. 3, and is set forth in photographic form on page 70 of the transcript.

Counsel for plaintiff apparently thought that this letter shows that Pekovich intended that the 4,000 shares should be given to Coughlin in addition to his salary, but we submit that it shows exactly the contrary.

While the letter is undated and it does not appear just when it was written, it does throw some light on what the agreement was as Pekovich understood it.

In the first part it refers to the letter of February 5, 1954, and states that it is very plain that the stock had been promised in consideration of the work to be performed, whereas from the books it appears that Coughlin was receiving cash monthly compensation.

The letter clearly implies that the writer did not think that Coughlin was entitled to the stock, but said that if under the circumstances he was to be given the stock, Coughlin's account should be straightened up otherwise. The letter concludes by saying that the stock cannot be delivered before it is registered with the S.E.C. and that Coughlin understood this because he was carrying on all correspondence. This certainly does not indicate that Pekovich thought Coughlin was entitled to the stock, because he had previously expressed himself to the contrary in the letter, but simply said that if it was decided to give the stock to Coughlin

it could not be delivered before it was registered with the S.E.C.

From the foregoing, it appears that Pekovich firmly took the position at all times that the 4,000 shares of stock were to be given to Coughlin as compensation for his services and that when it appeared that Coughlin had paid himself for his services in cash, Pekovich consistently took the stand that Coughlin was not also entitled to the stock.

After Coughlin died, he was succeeded by William S. Dapceovich in the position with the company as secretary-treasurer and bookkeeper at the same salary of \$75.00 a month that the previous holders of the position had received. He identified the statement already referred to as defendant's Exhibit A (76-7) showing the payments Coughlin had received for his services and explained it in detail. He testified that the checks were all issued to Coughlin and signed by him and no one else (78).

Witness Dapceovich testified that the salary to his knowledge was set up as a precedent and that all the previous secretary-treasurers had received the same amount, namely \$75.00. Along with the salary of \$75.00 a month he received, the mining company furnished the office space and all the facilities, and he worked right in the office (100).

Finally defendant's Exhibit E was introduced (106). This is the Inventory and Appraisement filed in the estate of Robert E. Coughlin, deceased, and among other items lists only the 1,000 shares of the Admiralty Alaska Gold Mining Company. It is dated the 2nd day

of August, 1956, and indicates that no claim was made at that time that the deceased was entitled to the additional shares here in question.

It would serve no useful purpose to go into further detail in reciting testimony offered in this case. As we have already indicated we think that the letter from Pekovich to Coughlin dated February 5, 1954 (Exhibit No. 2, 27) shows that the 4,000 shares of stock were to be given as compensation for services, and when it was admitted that Coughlin thereafter paid himself and received the regular salary of \$75.00 a month, that should have been deemed to be sufficient to show that the claim herein made is not valid.

Nothing was adduced in the further evidence to justify a contrary conclusion and the oral opinion of the court does not indicate the reason for changing the opinion previously expressed.

### **The District Court Erred in Making Its Findings and Conclusions**

The oral opinion of the court beginning at page 147, says that this whole thing here was handled in a very careless, slipshod manner, which may be admitted, but that does not justify a decision contrary to the facts as to the real issue involved. Reference is made to the fact that the stock had not been issued because the matter was under investigation by the Securities Exchange Commission, whereupon the court simply said that it seems that the burden of proof has been sustained by the plaintiff and that the stock was in the nature of a bonus and additional to the \$75.00 a month. This is fol-



lowed by the statement that there was no protest when Coughlin started drawing the \$75.00 a month and that he can't believe that the defendant Pekovich didn't know that Coughlin was drawing the \$75.00 per month over a period of over a year.

Pekovich had testified in effect that he did not know that Coughlin was paying himself in cash, or at least he indicated that he did not care. He said in effect that if money had been on hand, he would not have offered Coughlin the stock in lieu thereof and so when money became available, Coughlin evidently felt that it was all right for him to take the money instead of the stock, and if Pekovich knew about it he did not care.

The stock had gone down somewhat in the meantime, which probably explains the reason for Coughlin deciding to take the cash instead of the stock, and since Pekovich wanted Coughlin to have at least the going salary for the position he did not object or would not have objected if he had known about it.

The oral opinion (149) finally states that apparently the stock had gone down after the letter was written and says that therefore maybe nobody was particularly interested in the stock, but the agreement was still there.

The agreement was still there, but that agreement was that Coughlin should receive 4,000 shares of stock in compensation for his services, and the plaintiff herein as his beneficiary should not be heard to complain because he was permitted to take \$75.00 a month instead when the stock had depreciated in value. Under the circumstances, it is certainly not fair to hold that,

since Coughlin decided to take cash for his services instead of the stock which had depreciated in value, she is now entitled to both.

Notwithstanding all of this, the court signed and entered Findings of Fact to the effect that Coughlin was to receive \$75.00 as a salary and as an additional inducement to have him perform the work, Pekovich entered into an agreement to give him in addition thereto 4,000 shares of stock (11-12).

In addition to requiring the defendant Pekovich to deliver to the plaintiff 4,000 shares of common stock of Admiralty Alaska Gold Mining Company, the court gave judgment against him for the costs and disbursements, including an attorneys' fee of \$340.00 (instead of \$450.00 as set forth in the transcript (15)).

### CONCLUSION

The judgment was rendered against Pekovich alone and we shall not concern ourselves with the question as to whether the corporation was bound by his acts in this respect. We think it is clear that plaintiff is not entitled to the 4,000 shares of stock and hence that the defendant Pekovich should not be required to pay any costs or attorneys' fees.

Respectfully submitted,

FRED J. WETTRICK,  
JOSEPH A. McLEAN,

Dec. 20, 1957.

*Attorneys for Appellants.*

## APPENDIX

**Table of Exhibits Pursuant to Paragraph 2(f) of Rule 18**

<i>Plaintiffs' Exhibits</i>		<i>Identified</i>	<i>Received</i>
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3.	Letter (undated)	69	70
4.	Letter dated Dec. 3, 1954	132	133
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